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06 No. 987

In The
Supreme Court of the United States

LAWRENCE F. GLASER and MAUREEN GLASER, individually and on behalf of KIMBERLY, ERIN, HANNAH, and BENJAMIN GLASER,

Petitioners,

versus

ENZO BIOCHEM, INC., HEIMAN GROSS, BARRY WEINER, ELAZAR RABBANI, SHARIM RABBANI, JOHN DELUCCA, DEAN ENGELHARDT, and DOES 1-50,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners submit this short reply to Respondents' Opposition to the Petition for Writ of Certiorari in order to address Respondents' claims that:

a. the Fourth Circuit's opinion "does not represent a departure from settled law, but rather a proper application of it, and as such, it does not warrant review by this Court" (Opp. Br. at 10)

and

b. that *Dura Pharmaceuticals v. Broudo, Inc.*, 544 U.S. 336 (2005) was mere surplusage because the Fourth Circuit only "cited *Dura* for its analysis and the proposition that Petitioners were required to plead loss causation under state common law. Review of that state common law issue by this Court is not warranted." Opp. Br. at 15.

ARGUMENT

I. Respondents' Position Before This Court Regarding The Significance Of *Dura* Is Contrary To The Position That They Took Below.

Recognizing that the lower courts' unwarranted extension of *Dura*, especially in light of this Court's statements limiting *Dura*, creates an issue worthy of this Court's consideration, Respondents have attempted to minimize the effect of *Dura* by portraying *Dura* as simply authority consistent with the Fourth Circuit's conclusions regarding Petitioners' alleged failure to adequately plead loss causation. Respondents, however, conveniently ignore,

in their analysis, that the first panel of the Fourth Circuit had scrutinized Petitioners' amended complaint and found, as a matter of law, that it had satisfied all the pleading requirements necessary to state a claim under Virginia common law fraud. See App. Pet. 24-29, 31. The first panel, in their decision cited *Bank of Montreal v. Signet Bank*, 193 F.3d 818 (4th Cir. 1999), as setting forth the elements necessary to state a claim under Virginia common law, which specifically included causation. The first panel reversed the district court's conclusion that Petitioners had failed to state a claim and found that Petitioners' amended complaint, as pled, was sufficient. The first panel also held that further amendment was not necessary in order for Petitioners to be able to proceed. Respondents did not file a petition for rehearing claiming that the panel had erred in finding Petitioners' claim to be sufficient including the allegation that Petitioner suffered damages as a consequence of Respondents' fraud.

After remand to the district court, Respondents, under well established principles, could not re-raise the sufficiency of the amended complaint because that issue had been conclusively determined by the first panel. Nor was the district court free to substitute its judgment for the judgment of the first panel. Indeed, under principles of law of the case doctrine, the second panel could not overrule the first panel's adjudication of this issue in this case.[1] Consequently, on remand, Respondents filed a new motion

[1] While the second panel is free to disagree with the first panel's decision as applied to a subsequent case, it could not overrule the first panel's decision because the second panel is coequal with the first. Only the Fourth Circuit en banc could change the first panel's decision as applied to Petitioners.

to dismiss, claiming that this Court's decision in *Dura* was an intervening authority, which permitted the district court to reconsider the sufficiency of the complaint. In the first page of their memorandum in support of their motion, Respondents stated:

> "[O]n April 19, 2005, subsequent to the Fourth Circuit's decision in this action, the United States Supreme Court issued the widely reported landmark decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. __ (2005) Slip Op. April 19, 2005 (a copy of which is attached for the convenience of the Court as Exhibit E to the Chase Declaration). In the *Dura Pharmaceuticals* case, the Supreme Court addressed analogous fraud claims and specifically rejected the inflated purchase price approach to causation relied upon by plaintiffs in their pleadings. The Supreme Court stressed that such a causation approach is inconsistent with well-established common law causation principles. Indeed, the U.S. Supreme Court's discussion of the requisite pleadings to establish causation of alleged losses at common law in this securities trading context leaves no doubt that the plaintiffs' pleadings of common law fraud must be rejected as a matter of law." Memo at 1-2.

And if there can be any doubt as to Respondents reliance on *Dura* as the basis for rearguing their motion to dismiss, their own heading makes clear that *Dura* was the focal point of their claim. "Plaintiffs common law fraud claim must be dismissed because Plaintiffs do not plead and are unable to plead sufficient causation as articulated by the Supreme Court in the recent *Dura Pharmaceuticals* case." Memo at 7, R. 0029.

In their reply brief in the district court, Enzo argued "First, as we noted, the *Dura Pharmaceutical* case was decided subsequent to the Fourth Circuit's in this matter. One well-recognized exception to the law of the case doctrine is the issuance by a higher authority of a contrary decision of law applicable to the issue. (Citations omitted) . . . In all events, there can be little doubt that the *Dura Pharmaceuticals* decision would have had a serious impact on the Fourth Circuit had it been issued prior to their Opinion." Reply Memo at 9, R. 155. Again, in their reply, Respondents used the same heading as they did in their initial brief claiming that the "Plaintiffs' Common Law Fraud Claim Must Be Dismissed Because Plaintiffs Do Not Plead, and are Unable to Plead, Sufficient Causation as Articulated by the Supreme Court in the Recent Dura Pharmaceuticals Case." Reply Memo at 4, R. 150. In fact, Respondents' subheading was entitled, "Plaintiffs' Attempts to Establish Causation and Distinguish the Dura Pharmaceuticals Case Are Without Merit." *Id.* These characterizations of *Dura* were in fact, essential to their position and to their argument. If *Dura* was not an "intervening authority" then neither the district court nor the second panel had the authority to reexamine the first panel's decision that Petitioners had sufficiently pled their common law claim.

Respondents' remarkable shift in position can only be explained by their tacit acknowledgment that this Court's decision in *Dura* was misused by the district court and the second panel of the Fourth Circuit, who affirmed the dismissal. Respondents also completely shy away from the district court's basis for dismissing Petitioners' claim – that Petitioners had sold their stock prior to the alleged

corrective announcement at the RAC meeting. The claimed requirement of ownership at the time of the corrective disclosure is solely based on *Dura* and is not contained or addressed in any of the Virginia common law cases cited by Respondent.

Petitioners respectfully submit that contrary to Respondents' contention it is not a "well settled principle" of Virginia common law or any other state's common law that in a misrepresentation common law fraud case, that the plaintiff must prove that he owned the stock when a public disclosure of the truth was made and the stock price declined thereafter. The Arizona Court of Appeals in *Grand v. Nachio*, 147 P.3d 763 (Ariz. Ct. App. 2006) recently rejected the Fourth Circuit's characterization of this requirement as a "well settled principle of common law" finding that the Fourth Circuit's (second panel) decision was the only appellate court which had imposed such a requirement. *Id.* at 774. The Arizona court also held that such a showing was not required by *Dura*.[2] *Id.* at 775. While *Dura* in fact discussed a number of well settled principles of common law, none of them support the basis for the reversal of the first panel's decision in this case.

Respondents continually cite to a mythical requirement that a plaintiff must plead and prove loss causation at the complaint stage. Opp. Br. at 8-10. Respondents ignore the well-settled pleading rule that for purposes of a motion to dismiss, all the facts contained in the complaint,

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[2] In *Grand*, the appellate court reversed the trial court's entry of summary judgment in favor of the defendant on the ground that the plaintiff had sold its stock prior to the disclosure of the truth and therefore under *Dura*, its claim was barred.

including causation, are taken as true. No proof is necessary at this stage. It is only in the context of the PSLRA that a plaintiff's obligation to demonstrate more than just an allegation of fact is required. The Respondents' continued reliance upon the assertion of contested facts, e.g., characterization of the Petitioner as a "day trader" rather than an investor, is an intentional effort to obfuscate the issue now before the Court. There is no question that the only facts material to the sufficiency of the Petitioners' pleading are those alleged in the complaint. Those very facts relied upon by the first panel in upholding the sufficiency of Petitioners' claim.

II. *Dura* Does Not Represent Intervening Authority In This Case.

Petitioners agree that this Court's decision in *Dura* did not represent a departure from well-settled law in state common law fraud cases and in fact, does not even apply to that category of claims. Rather, *Dura* was expressly limited to class action claims based upon a fraud on the market theory. 544 U.S. at 342. More importantly, the second panel's ruling that "*Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed" (*Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 477 (4th Cir. 2006)) is expressly contrary to this Court's decision. This Court's decision in *Dura* did not limit a plaintiff to one method of proving loss causation in misrepresentation fraud cases. The second panel's decision in *Glaser* has not been adopted by any other circuit or any

state appellate court.[3] This Court granted certiorari in *Dura* in order to correct a disparity in the pleading requirements for federal class actions based upon a fraud-on-the-market theory of fraud between the Ninth Circuit and the other circuits. The disparity between the second panel's mandatory pleading requirement and the other circuits is far greater and expressly contrary to this Court's decision in *Dura*. There can also be no question that the impact and injustice of the second panel's decision is far greater than that of the Ninth Circuit's liberal pleading standard in fraud-on-the-market theory cases. The Ninth Circuit placed no limitation on a loss causation defense while the second panel's pleading requirement effectively gives the alleged wrongdoer absolute immunity from a misrepresentation fraud claim so long as there is no public disclosure of the truth.

Consequently, *Dura*, based upon the express language of this Court's decision, did not constitute an intervening authority and for the reasons stated in Petitioners' petition herein provided no basis for the lower courts' reversal of the first panel's decision.

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[3] See *Grand v. Nachio*, 147 P.3d 763 (Ariz. Ct. App. 2006). In *Grand*, the Court of Appeals of Arizona specifically rejected the second panel's ruling that "*Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed." *Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 477 (4th Cir. 2006) at 774. The Arizona Court of Appeals' opinion succinctly illustrates how the second panel misconstrued *Dura*'s requirements both for pleading loss causation and showing or proving loss causation. Since there is no serious question that loss causation need not depend on prior public disclosure of the defendant's misrepresentations (see *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005)), the second panel's imposition of such a showing as a pleading requirement is wholly inconsistent with *Dura*.

Petitioners submit that this Court's clarification of the scope and application of its decision in *Dura* to common law misrepresentation fraud claims involving the purchase or sale of securities is critical to the orderly prosecution and disposition of such claims in both federal and state trial courts in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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